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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 620

BROTHERHOOD OF RAILROAD TRAINMEN, *Petitioner*,

v.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOLDBERG, PREVIANT & UELMEN
511 Warner Theatre Building
Milwaukee, Wisconsin 53203

DAVID LEO UELMEN

SCHOENE and KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

MILTON KRAMER

Attorneys for Petitioner

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The Brotherhood of Railroad Trainmen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 27, 1967.

OPINIONS BELOW

The opinion of the District Court (J.A. 38-39)[1] has not been reported officially or unofficially and is appended hereto as Appendix A. The opinion of the Court of Appeals (Appendix B) has not yet been officially reported. It is unofficially reported at 65 LRRM 2965.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 27, 1967, and is appended hereto as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether that part of the railroad "work rules" arbitration, ordered by Congress in Public Law 88-108, which was delegated by the arbitration board [No. 282] established by Congress in that Act to special boards of adjustment, was required to be conducted by such special boards in accordance with the procedures and within the procedural restrictions prescribed by Congress for the conduct of the arbitration, i.e., whether such special boards of adjustment were required to conduct the arbitration delegated to them in accordance with the procedures of Sections 7 and 8 of the Railway Labor Act to the extent Board 282 was required to do so.

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[1] "J.A." refers to the printed joint appendix filed in the Court of Appeals. "B" refers to the transcript of evidentiary proceedings in four volumes, filed in the Court of Appeals, which was not printed in the joint appendix. "Pltf. Ex." refers to exhibits which were filed in the Court of Appeals in the form of an exhibit book, and not printed in the joint appendix. The transcript and exhibit book, although not printed, were made a part of the joint appendix.

2. Whether the judgment in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11 (D.D.C. 1964), *aff'd* 331 F. 2d 1020 (D.C. Cir. 1964), *cert. denied*, 337 U.S. 918 (1964), prior to the establishment of any such special boards of adjustment or the commencement of any of their proceedings, and prior to any issue having arisen concerning what procedural requirements are applicable to such special boards, is *res judicata* of Question No. 1.

3. Whether Board 282, consistent with P.L. 88-108, may interpret its award to permit the special boards of adjustment it created: (1) to deny the request of one party that a complete record, including a transcript, of the proceedings be maintained; (2) to enter an award without making any findings setting forth the basis for its decision; and (3) to conduct the proceedings without complying with the due process requirements of Sections 7 and 8 of the Railway Labor Act.

4. Whether the proceeding before the special board of adjustment accorded petitioner due process of law as required by the United States Constitution, apart from its noncompliance with Sections 7 and 8 of the Railway Labor Act.

STATUTES INVOLVED

The pertinent provisions of Public Law 88-108, 77 Stat. 132; 45 U.S.C. § 157 (1966 Supp.), and the Railway Labor Act, 45 U.S.C., §§ 151 ff, are set forth in Appendix D.

STATEMENT

Like the companion cases, Cases Nos. 499, 500, 501, and 502,[2] the instant case arises under Public Law 88-108. In Public Law 88-108, Congress required the railroads and railroad operating unions to submit their disputes over the proper manning of trains to compulsory arbitration. The manning dispute concerned "firemen on diesels" and "crew consist", i.e., the number of employees in road and yard service. It is only the crew consist issue which is involved here and not the firemen issue.

Board 282 concluded that this issue, unlike the firemen issue, could not be resolved by a nation-wide formula, but had to be resolved on a local basis. Board 282, therefore, provided for local negotiations (Award, Part III, A),[3] and, where these proved unfruitful, for the submission of disputes to special local boards of adjustment for arbitration. (Award, Part III, B).

Part III, B, established the method for calling a special board into existence, the special board's composition (a neutral referee and one representative of each party), its time limits, and the payment of expenses. As to all other procedural matters, Award 282 is completely silent.

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[2] *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc. (St. Louis Southwestern R.R.)* (No. 499); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc. (Missouri Pacific R.R.)* (No. 500); *Brotherhood of Railroad Trainmen* v. *Chicago, M. St. Paul & Pacific R.R.* (No. 501); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc. (Terminal Railroad Assn. of St. Louis)* (No. 502).

[3] The text of Award 282 is unofficially reported in 41 Lab. Arb. Reports 673 (1963). The relevant portion appears at J.A. 20-25.

Part III, C, sets forth the detailed and complex guidelines that the special boards were to follow in reaching their decisions. While the most important considerations in these guidelines were the "insurance of adequate safety" and the "avoidance of unreasonable [work] burdens", the guidelines also required the special boards to review each disputed job assignment in light of operating conditions, changes in operating conditions, physical characteristics of the line, the number of intersections to be protected, applicable state and municipal regulations, the presence or absence of a fireman in the engine, and the like. To apply these guidelines correctly, precise factual information was necessary; and where the facts were disputed required the special boards to sift through conflicting and partisan presentations in an effort to obtain an accurate picture of the actual conditions.

Purporting to act within this framework, Respondent, on March 30, 1964, proposed to eliminate 162 job assignments out of a total of 382 crews in 59 yards scattered through six states and to change train baggagemen assignments on 7 trains (Pltf. Ex. 2).[4]

Before Respondent sent this proposal to Petitioner on March 30, 1964, it had completed time studies on these job assignments, collected and collated data in support of its position, and had begun preparation of written submissions for presentation to the special board (R. 365).

On May 1, 1964, after four brief negotiating meetings with Petitioner, Respondent requested that a

[4] Petitioner below questioned whether these baggagemen assignments were covered by Award 282. This question, however, is not presented in this petition.

Special Board be convened (Pltf. Ex. 14). Although Petitioner protested that negotiations had barely begun, this request was granted on May 18 (Pltf. Ex. 17, 18).

Thus, disputes on 162 job assignments, and 7 baggagemen assignments, were submitted to the special board at a time when Respondent, but not Petitioner (which did not know in advance the job assignments that Respondent would ask the special board to eliminate), was able to present its complete position through detailed written submissions.

On May 28, 1964, Petitioner and Respondent met with the Referee to establish the hearing procedures. Despite Petitioner's protests, the Referee ordered the hearings to be held in Respondent's office and to begin on June 1, 1964. He rejected Petitioner's request that a transcript be taken, unless the Petitioner agreed to pay its full costs. As a result, no transcript of the proceeding was kept.

Starting June 1, hearings were held daily (R. 68, 164); they would begin at 9:30 a.m. and end at 4:30 p.m. There was no schedule of particular job assignments to be heard on a specific day; what cases were heard, would depend on the number already completed.

In these hearings, Petitioner had to rely on questionnaires sent to its membership (these questionnaires were intended to be a basis for the preparation of its written submissions), witnesses, and oral arguments.

The Referee denied Petitioner's repeated requests that he grant adjournments, that he view at least some

of the properties,[5] and that he extend the time to file written submissions. Originally, the Referee had ruled that all written materials had to be filed with him no later than June 26, 1964. One week later, however, he ruled that all written material relating to the La-Crosse Division and Milwaukee Division had to be filed that same day; material for Milwaukee terminals had to be filed by June 17; the Twin Cities materials by June 18; and as to all other yards to be filed by June 19. June 19 was 30 days prior to the expiration of the Special Board's 60 day jurisdictional time period.

On July 10, the special board not only adopted the Respondent's position on every disputed job assignment, but copied the very language from the Company's notice including the phrase "It is proposed" (Pltf. Ex. 31, p. 18). No findings or opinion accompanied this Award.

Petitioner first challenged the Special Board's award in the United States District Court for the District of Columbia on two grounds: (1) that the Special Board procedures and the conduct of the Referee violated due process of law, and; (2) that the Award did not comply with the guidelines. This challenge was based, in part, upon undisputed conduct of the Referee and, in part, upon charges which the Referee denied. On appeal from the District Court's ruling, the Court of Appeals for the District of Columbia Circuit remanded the parties to Board 282 for that Board, in the exercise of its "primary jurisdiction", to afford Petitioner "meaningful review". *Brother-*

[5] Many of them were in the city where the hearings were held.

hood of Railroad Trainmen v. *Chicago, Milwaukee, St. Paul & Pac. R.R.*, 345 F. 2d 985 (D.C. Cir. 1965).

The same Court in *Brotherhood of Railroad Trainmen* v. *Certain Carriers*, 349 F. 2d 207 (D.C. Cir. 1965) remanded the question "whether or not the Special Boards of Adjustment had been required to conduct the arbitrations in compliance with Sections 7 and 8 of the Railway Labor Act."[6]

On remand, Board 282 decided that the requirements of compliance with Sections 7 and 8 "applies only to Board 282 and not to the special boards of adjustment provided for in its award." (J.A. 33). On the question of "meaningful review", it examined the record to determine whether it was sufficient to permit awards based on the guidelines and whether the BRT was afforded a full and fair hearing. On the lack of a transcript, it ruled that "a party wishing review of a decision by a special board must assume the obligation of providing a verbatim transcript . . . ." (J.A. 36)

The Court of Appeals upheld this Answer on the ground that the Court's decision which originally upheld the validity of the Award was *res judicata* on the question whether the requirements of Sections 7 and 8 of the Railway Labor Act were applicable to the Special Boards and that Petitioner was accorded a "meaningful review" by Board 282 which found no violation of due process.

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[6] Section 4 of Public Law 88-108 provided, in pertinent part:

"To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, . . ."

Circuit Judge Wright dissented, as he did in *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.* (*St. Louis Southwestern R.R.*) (No. 499); *Brotherhood of Railroad Trainmen* v. *Certain Carriers, Etc.* (*Missouri Pacific R.R.*) (No. 500), in which reviews are also being sought in this Court. In his dissent he considered that since Congress, conscious of the seriousness of its action in imposing compulsory arbitration, had provided mandatory procedural due process safeguards for the arbitration, it was inconceivable that Board 282 could delegate its arbitral authority to local boards without such safeguards being applicable to the local boards. He considered the ruling of the majority concerning *res judicata* inconsistent with the decision of the Court in *Brotherhood of Railroad Trainmen* v. *Certain Carriers, etc.*, 349 F. 2d 207 (D.C. Cir. 1965), in which case the Court, two years earlier, had, *sub silentio*, rejected the *res judicata* argument and remanded the parties to further proceedings under Public Law 88-108. He pointed out further that the Court of Appeals could not properly resolve the question of whether Petitioner was accorded due process because in violation of Section 7 of the Railway Labor Act no transcript was provided.

REASONS FOR GRANTING THE WRIT

There are three basic issues in this case, each of which calls for review by this Court. The first of these is whether Arbitration Board 282 could delegate a portion of the arbitral function conferred on it by Congress to local special boards of adjustment and relieve those local boards of the procedural requirements of Sections 7 and 8 of the Railway Labor Act which

requirements Congress had specified should be complied with in the arbitration proceedings. The second question calling for review by this Court is whether the unsuccessful effort by Petitioner to impeach the original award of board 282, before any of the local boards had been asked for or established and before it could be known what procedures they would believe would be applicable or what procedures they would follow, is *res judicata,* that Sections 7 and 8 were not applicable to their proceedings. The third question is whether the procedure actually followed by the special board of adjustment involved in this case denied Petitioner due process of law apart from it not complying with the procedures of Sections 7 and 8 of the Railway Labor Act.

The first two of the foregoing questions, and their importance, are the same as those questions in another petition for certiorari pending in this court filed August 16, 1967, *Brotherhood of Railroad Trainmen* v. *Certain Carriers, etc.,* No. 499.

The third question calling for review by this Court is almost the same as in No. 499. This is whether the procedure actually followed by the local board was a denial of constitutional due process, quite apart from its failure to comply with Sections 7 and 8 of the Railway Labor Act. In the Statement, *supra,* we have shown some respects in which due process was denied: the bias of the "neutral", the prejudicial locale of the hearings, the schedule prescribed by the "neutral" making it impossible for Petitioner to present its case, etc. As the dissenting opinion below pointed out, the violation of the requirement of Section 7 that a record be kept made it impossible to determine such issues.

The decision below is predicated primarily on the decision in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C. 1964) being *res judicata* that Sections 7 and 8 were not to govern the procedures of the local boards. In substance, this position is that at that time before there were any local boards, we should have known that the local boards would not comply with Sections 7 and 8 of the Railway Labor Act and should have known that Board 282 would later rule that such non-compliance was proper.

Nothing in Award 282 prevented the special boards from acting in conformity with the due process requirements of Sections 7 and 8[7] or prevented Board 282 from ruling that their awards were defective because they did not. At the time of the decision in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. R.R., supra,* therefore, Petitioner could challenge the award only on the ground that there existed a *possibility* that the special boards would not conduct the hearings in accordance with Sections 7 and 8 of the Railway Labor Act and a *possibility* that Board 282 would interpret its Award to conflict with Public Law 88-108.

Moreover, Board 282 had explicit authority to interpret its Award. It, therefore, was in a position to interpret the Award in such a way to make it conform to the applicable statutory requirements.

If the holding below is correct, it would mean that Petitioner could have impeached Award 282 simply

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[7] For example, Board 282 acknowledged that the special board here could have ordered a transcript (J.A. 36).

by showing that it was susceptible to an interpretation which would make it unlawful, even though it was also susceptible to interpretations that would make it lawful. A requirement that a compulsory arbitration award can be sustained only if every possible interpretation of it would render it lawful is unnecessary and unrealistic.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

GOLDBERG, PREVIANT & UELMEN
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

DAVID LEO UELMEN

SCHOENE and KRAMER
1625 K Street, N.W.
Washington, D. C. 20006

MILTON KRAMER

Attorneys for Petitioner

September, 1967